AUG 31 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 297 .

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

—against—

GEORGE P. KORTE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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THE COURT PRESS, N. Y. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, The New York, New Haven and Hartford Railroad Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in the above cause on July 24, 1951, affirming a judgment of the District Court of the United States for the Eastern District of New York in favor of respondent, and respectfully represents:

The Opinions of the Courts Below.

There was no opinion of the trial court. The majority and dissenting opinions in the Court of

Appeals for the Second Circuit have not yet been reported but appear at pages 286 to 295 and 296 to 297, respectively, of the Record.

Jurisdiction.

1. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

2. The judgment of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court, was entered on July 24, 1951 (R. 298).

Statutes Involved.

The statutes involved, which are set forth in the Appendix, *infra,* are the Federal Employers' Liability Act of 1908, as amended (Act of April 22, 1908, c. 149, § 1, 35 Stat. 65, 45 U. S. C. § 51); the Federal Business Records Act (28 U. S. C. § 1732); and the New York Civil Practice Act, § 374-a. The pertinent Federal Rules of Civil Procedure, 28 U. S. C. § 723(c), are also set forth in the Appendix.

The Questions Presented.

1. Whether respondent failed to prove petitioner's negligence where he failed to prove that any defect existed in the operating mechanism of the train trap door involved in his injury, failed to prove what prevented the trap door from rising when the mechanism for opening it was operated, failed to prove that petitioner knew or should have known that the door was not working properly, failed to prove that petitioner's system of inspection and maintenance of trap doors was inadequate or negligent, and failed to

prove that petitioner should reasonably have foreseen his injury.

2. Whether the trial court improperly admitted evidence under the Federal Business Records Act where it received in evidence as business records unsworn letters of Dr. O'Connor and Dr. Brody written in anticipation of litigation and containing a description of physical examinations of respondent together with opinions based thereon, without requiring that the doctors be produced in court to qualify as experts and be cross-examined or that proof be submitted to show that the letters were made in the regular course of business and that it was their regular course of business and duty to make such letters.

Summary Statement of the Matter Involved.

Respondent, an employee of petitioner, brought suit under the Federal Employers' Liability Act to recover damages for injuries sustained by him on December 20, 1946 in the course of his employment and while engaged in interstate commerce (R. 4-5).

Judgment for plaintiff was entered upon a verdict from the jury for $25,000 in his favor (R. 280).

The proof at the trial showed the following main facts:

Respondent was injured pulling up a trap door over the exit steps of the fifth or sixth head car in petitioner's train as it approached the 125th Street Railroad Station in New York City (R. 16, 18, 19, 60, 65). Respondent was a regular ticket collector on the train, which was making its daily weekday

run from New Haven, Connecticut to 42nd Street, New York City (R. 8, 10, 212). At the 125th Street Station the train stopped only to discharge passengers, not to pick them up (R. 57).

To open the trap door respondent stepped on a foot pedal, colloquially called a "dog", marked "D" in Exhibit 1 and "foot" in Exhibit C (R. 18, 190, 250, 264). As the stem supporting the foot pedal went down, it would push a rotating lever (R. 187). As the rear of the lever went down and forward, the front of the lever would simultaneously rotate up and back, drawing with it from off the surface of the trap door into a housing or covering the latch or bolt which held the door down, marked "L" in Exhibit 1 and "B" in Exhibit C (R. 19, 187-189, 250, 264). As soon as the latch or bolt became fully withdrawn off the door, the rear of the rotating lever as it moved forward would push a tripper or starter, marked "S" in Exhibit C, against the under side of the trap door so as to kick the door up about three eighths of an inch (R. 189-190, 264). A heavy spring located in a housing near the base of the under side of the trap door would then take effect and raise the door from 3 to 16 inches (R. 190-191). Respondent would then open the trap door the rest of the way by hand (R. 15).

Respondent testified that the latch or bolt did not withdraw from over the trap door until he had pressed down on the foot pedal or "dog" a number of times (R. 18-19, 60). The trap door did not then rise at all, so he reached down with his right hand and gave the door two or three pulls before it finally came up (R. 19, 61). If the trap door had failed

to come up, he would have opened the trap door of the immediately adjoining exit (R. 66). On the last pull as the door came up he felt pain in his back (R. 19).

Respondent claimed that as he leaned over to pull the door he saw some rust on the trap door, the foot pedal, the housing over the mechanism, and the top of the latch (R. 62-63). He did not see any rust at any place which could have affected the operation of the door-raising mechanism, and rust would not have affected it (R. 192, 196).

Respondent originally claimed in his written accident report that the trap "stuck due to no oil or spring in dog" (R. 72-73, 260). He could not see whether the working parts of the mechanism were oiled, and they needed none to function properly (R. 64, 73, 192). He did not inspect the mechanism after his accident (R. 73). He could not see the springs in the mechanism, which served to push the foot pedal up and to keep the latch over the door, and their failure to function properly could not have hindered the trap door from rising (R. 64, 73, 188, 191).

Respondent failed to prove that any specific defect kept the trap door from rising, or that it was not prevented from rising by the way he operated the foot pedal, by his foot being on the trap door at first, or by some foreign body becoming temporarily wedged in at the edge of the door. The door opened properly before and after the accident, and during December no defect which would affect the opening of the door was discovered despite regular inspections twice a day during the week and special inspections each

weekend (R. 65-66, 214, 227, 230, 233, 236, 221, 222, 238-239, 272, 193-194, 197).

Respondent failed to prove that petitioner knew or should have known of any defect or how long any defect had existed. He did not know what petitioner's system of maintenance and inspection was (R. 49-52, 64, 91). He failed to prove anything wrong or inadequate about the system. He failed to prove any grounds why petitioner should reasonably have foreseen injury to respondent.

During the trial there were received in evidence over petitioner's objections three unsworn letters from doctors describing physical examinations of respondent and setting forth medical conclusions and opinions (R. 24-31).

Respondent returned to New Haven, Connecticut after his accident, and was treated there at the Railroad Emergency Hospital by Dr. Jenkins off and on for about three months (R. 21-23). Dr. Jenkins twice sent respondent for examination to the office of Dr. O'Connor, an orthopedic specialist (R. 23-24). Respondent was then referred for examination by Dr. O'Connor to Dr. Brody, a neurosurgeon. (R. 24).

After each of the two examinations Dr. O'Connor made he wrote a letter to petitioner's claim department, and after the examination Dr. Brody made he wrote a letter to Dr. O'Connor, sending a copy to Dr. Jenkins (Exs. 2, 3, 4, R. 252-256). At the time the letters were written neither Dr. O'Connor nor Dr. Brody had treated or been requested to treat respondent or had done anything but examine him and write the letters (R. 23-24, 34).

Respondent offered these three letters in evidence as writings made in the regular course of business (R. 25). Respondent offered no proof to show that the letters were written or received in the regular course of business or as part of any one's duty, that any one had any regular practice or course of business to write or receive such letters, or that any practice or course of business of any kind, regular or otherwise, existed with respect to the writing or receiving of the letters. Respondent did not prove that Dr. O'Connor and Dr. Brody were employees or agents of petitioner, that they were authorized by petitioner to write the letters, or that the contents of the letters were ever approved by petitioner. Respondent made no effort to produce the doctors for cross-examination, to account for their absence, or to establish their qualifications as experts.

Subsequent to the receipt in evidence of these letters two specialists testified for respondent that he had the back injuries diagnosed by Dr. O'Connor and Dr. Brody and certain further injuries, and one specialist for petitioner denied that respondent had any of these injuries, principally because of the symptoms which had disappeared or failed to appear or to progress in the years following their examinations (R. 98-100, 122, 129, 156-162, 172-173). Petitioner was deprived of the opportunity to cross-examine Dr. O'Connor and Dr. Brody as to whether their diagnoses would have remained the same at the end of four years despite respondent's symptoms, what weight they gave to the factors underlying their conclusions, how they reached them, how they would have interpreted later x-rays, what their medical qualifications were, and as to numerous other matters.

Petitioner was placed at an extreme disadvantage before the jury as a consequence, and respondent improperly secured the benefit of apparently having four doctors against one.

Specification of Errors.

The Court of Appeals for the Second Circuit erred:

1. In not reversing the judgment below and dismissing the complaint for failure to prove petitioner's negligence.

2. In not reversing the judgment below and ordering a new trial because of the prejudicial error committed by the reception into evidence of the letters of Dr. O'Connor and Dr. Brody.

3. In affirming the judgment of the District Court.

Reasons Relied on for the Granting of the Writ.

Petitioner contends that the writ should be granted for the following reasons:

1. *The decision of the Court of Appeals as to petitioner's negligence was clearly erroneous under the decisions of this Court determining what constitutes sufficient evidence to prove negligence in actions brought under the Federal Employers' Liability Act, since the decision rests solely on speculation.*

The majority opinion in the Court of Appeals plainly misapprehended the proof contained in the record when it concluded that there was sufficient

evidence for the jury to make a finding that petitioner was negligent.

The majority said (R. 286): "It appears that traps operating normally are opened by (1) stepping on a release mechanism, which frees the trap so that a spring forces it up from three to sixteen inches. . . ." This statement overlooked the function of the tripper or starter. The minority correctly pointed out (R. 296) that "the only unusual occurrence was the failure of the mechanism to start the upward movement which might have been because the door was jammed so tight that no pressure which the lever [the tripper or starter] could exert at the point of its contact could move it." Furthermore, the tripper or starter only failed once to work, that is, to push the trap door up the three-eighths of an inch which it was supposed to do so that the spring could then take effect and raise the door a further three to sixteen inches (R. 19, 190). Thereafter, as respondent held down the foot pedal or dog with his foot to keep the latch or bolt off the door the tripper or starter would fall back slightly and have no effect on the door (R. 61, 191). Moreover, the dog must be stepped on sharply to make it function properly (R. 189-190). Since the mechanism of the dog and the tripper was purely mechanical, with no springs assisting this part of its functioning, and since the door worked properly before and after the incident and was never discovered to be defective in any material respect, the only assumption or inference a jury could draw was that the door was mechanically sound but became temporarily stuck, either because respondent's foot mistakenly rested on it for a moment, because the dog was not held down firmly so as to keep the latch fully

off the door, or because some foreign substance was for the time being wedged into the door.

The majority opinion concluded that a jury could have found that the door did not rise because of rust or a broken spring (R. 287). It has already been demonstrated that the condition of the springs could not have caused what respondent saw happen. Since respondent could not see any of the working or contact parts of the mechanism, which were all hidden from his view, he could not state that rust, lack of oil or any other thing affected them, and neither rust where he saw it nor lack of oil affects the proper functioning of the mechanism. His inability to cause the latch or bolt to withdraw fully off the trap the first few times he stepped on the dog was equally irrelevant, since the latch did in fact finally withdraw, and it was only after it had been removed that the rest of the mechanism was free to commence working (R. 190).

Even under the assumption that a defect existed in the mechanism, it is well established that respondent must show that petitioner had actual or constructive notice of its existence. *Schilling* v. *Delaware & H. R. Corp.*, 114 F. 2d 69 (2d Cir. 1940). This the majority opinion apparently recognized. Yet there was clearly no proof of any actual knowledge, and in the absence of proof as to how long the defect had existed there could be no basis for a finding of constructive knowledge. The majority opinion tried to circumvent this hiatus in respondent's case by arguing that the jury could have found that respondent's prior routine inspection was not made, was made faultily, or uncovered the defect but was followed by

no corrective action (R. 288). In support thereof it incorrectly stated (R. 287) that "it was shown only that trap door repairs were made on plaintiff's train after he was injured and had filled out the customary accident report." Even if this contention were relevant on the issue of constructive notice, there was not a shred of proof in the record to support such a finding. The only repairs made were done before the accident (R. 221-222). The minority opinion made petitioner's position in this respect clear and succinctly demolished respondent's argument (R. 297).

Even under the further assumption that a defect in the mechanism of which petitioner had at least constructive notice existed, the accident, as the minority opinion pointed out, was not reasonably foreseeable (R. 296). When petitioner found that the door would not open as it was supposed to, he admittedly would ordinarily have opened the adjoining exit to let waiting passengers off (R. 66). Even if it could be deemed reasonable to foresee that he would attempt the unnecessary task of trying to force open the door manually, it was only remotely possible that injury would result therefrom to a healthy man used to physical labor and that such a man would continue to strain at the door with repeated efforts until he violently overstrained. His doing so clearly made himself, not petitioner, the voluntary agent and sole cause of his injury.

The majority opinion relied on speculation instead of facts to support the judgment. This Court has often found it necessary to admonish lower courts that in cases under the Federal Employers' Liability Act the employer's negligence must be proved, the employee has the burden of proof on the issue of negli-

gence, and findings of negligence may not rest upon conjecture and surmise.

> *New York Central R. Co.* v. *Ambrose,* 280 U. S. 486 (1930);
> *Pennsylvania R. Co.* v. *Chamberlain,* 288 U. S. 333 (1933);
> *Moore* v. *Chesapeake & O. R. Co.,* 340 U. S. 573 (1951).

The minority opinion fairly accused the majority of turning the Federal Employers' Liability Act into a sort of Workmen's Compensation Act (R. 296). It is important for this Court to continue as it has in the past to review cases like the present one to show lower courts in construing the Federal Employers' Liability Act where to draw the line between negligence and non-negligence, particularly where to do so will help to correct real injustice.

2. *The decision of the Court of Appeals for the Second Circuit in the present case is in direct conflict with the earlier decision of the Court of Appeals for the Third Circuit in Masterson* v. *Pennsylvania R. Co. on the important question of the admissibility in evidence of the letters of Dr. O'Connor and Dr. Brody under the Federal Business Records Act, and in probable conflict with decisions in other Courts of Appeals.*

In *Masterson* v. *Pennsylvania R. Co.,* 182 F. 2d 793 (3rd Cir. 1950), suit was brought under the Federal Employers' Liability Act to recover damages for an injury incurred in the course of employment while engaged in interstate commerce. The employee was sent by the chief medical examiner of his employer

for examination to two different doctors. At the trial the employee succeeded in having received in evidence as regular business records one letter from each doctor to the chief medical examiner setting forth a part of his history together with findings and conclusions reached as a result of the examination. The testimony of two other doctors chosen by his attorney who treated him and testified at the trial for him confirmed the diagnoses in the letters. The copies of the two letters received in evidence had been obtained from his employer by means of interrogatories. His employer put in evidence a letter from one of the two doctors saying that the letter received in evidence with his typewritten signature on it had been written by a substitute in his office during his absence and did not correctly state his own views, and also submitted testimony of three doctors to controvert his employee's medical case.

The Court of Appeals for the Third Circuit held that the doctors' letters placed in evidence by the employee were not admissible under the Federal Business Records Act, 28 U. S. C. § 1732. The opinion pointed out that the letters were in form not business records of the doctors who wrote them and were not identified by any one as having been made in the regular course of business, and that there was no proof that it was the regular course of the doctors' business to write such letters. Such a foundation must be laid in order to receive records under the Act, for the Act by explicit language requires such preliminary proof. Finally, the opinion pointed out that the letters violated the rules laid down by this Court in *Palmer* v. *Hoffman,* 318 U. S. 109 (1943), for the admissibility of evidence under the Act.

The majority opinion in the case at bar expressly disagreed with the prevailing opinion in the *Masterson* case (R. 295). Since the facts of the two cases are similar in all material respects, a square conflict between courts of appeals for different circuits now exists with respect to an important point in the law of evidence and in the construction and application of the Federal Business Records Act. The minority opinion in the present case believed that the decision in the *Masterson* case should be followed (R. 297).

There also exists a conflict in principle between the decision of the Court of Appeals for the Second Circuit in the case at bar and the decision of the Court of Appeals for the Fourth Circuit in *Gilbert* v. *Gulf Oil Corp.*, 175 F. 2d 705 (1949), of the Court of Appeals for the Fifth Circuit in *England* v. *United States*, 174 F. 2d 466 (1949), and of the Court of Appeals for the District of Columbia in *New York Life Insurance Co.* v. *Taylor*, 147 F. 2d 297 (1944).

In the *Gilbert* case it was held in reliance on *Palmer* v. *Hoffman, supra,* to have been prejudicial error to have admitted in evidence a letter to one of the litigants from the chief of the fire department of the town where the fire involved in the lawsuit occurred stating his findings and opinion as to the facts surrounding and the cause of the fire.

In the *England* case, which cites *Palmer* v. *Hoffman, supra,* a hospital record containing a long account of the patient's past life and opinions of doctors, based in part on the account, as to his mental condition was held not to be a contemporaneous record of events as required by the Federal Business Records

Act and to include expert opinions partly based on hearsay with no opportunity for cross-examination.

In the *Taylor* case, the court, relying expressly on this Court's decision in *Palmer* v. *Hoffman, supra,* excluded parts of a hospital record containing conversations by the patient with hospital attendants and psychiatrists and a report of a psychiatrist showing a diagnosis of psychoneurosis, as being not the type of business records provided for in the Federal Business Records Act.

3. *The decision of the Court of Appeals for the Second Circuit in the present case is in probable conflict, on the important question of the admissibility in evidence of the letters of Dr. O'Connor and Dr. Brody under the Federal Business Records Act, with the earlier decision of this Court in Palmer* v. *Hoffman, the scope and intent of which require clarification.*

In *Palmer* v. *Hoffman,* 318 U. S. 109 (1943), this Court held inadmissible under the Federal Business Records Act a statement in question-and-answer form by the engineer of the train which struck the injured plaintiff at a grade crossing. The statement was made to his employer in the regular course of business two days after the accident, and it was the regular course of business to make it. This Court pointed out that the statement was not a record made for the systematic conduct of the railroad company's business as a business and was not typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls, but was rather a document the primary utility of which lay in litigating not in railroading.

The majority opinion in the case at bar construed the decision of this Court in *Palmer* v. *Hoffman* as inapplicable to the facts here, though admitting that the extent of the limitation established in that case by this Court "is not wholly clear" (R. 293). The minority opinion in the present case agreed with the prevailing opinion in the *Masterson* case, *supra,* that the decision in the *Hoffman* case should control the admissibility of the doctors' letters (R. 297).

In determining that the *Hoffman* case doctrine was not applicable to the facts of this case, the majority opinion mistakenly stated that at the time Dr. O'Connor and Dr. Brody wrote their letters they had done more than just examine respondent. Actually, they did not treat him or take charge of his case until later (R. 23-24, 34).

The majority opinion further erroneously implied that while the doctors' letters were admissible as business records on behalf of respondent, they should not have been admitted if offered in evidence by petitioner (R. 293). Such an unreciprocal limitation on the Federal Business Records Act is not warranted by its language or by any construction of the Act by this Court, and should be overruled at once before it accomplishes irreparable harm.

The majority opinion glossed over the fact that both the Act and the *Hoffman* case require as a condition precedent to the admission of business records that with respect to the documents offered in evidence it must be shown that they were made in the regular course of business, that it was the regular course of business to make them contemporaneously, and that they are the type of business record which comes

within the Act rather than the type found not to be within the Act in the *Hoffman* case. Such a foundation was nowhere laid in this case, and the majority opinion incorrectly stated (R. 294) that petitioner does not question its absence, and incorrectly made light of the fact that the letters were written by the doctors not as an office record as part of an established system to record the results of the examinations for the use of the doctors in treating respondent but to support an opinion being rendered to petitioner after an accident when litigation was a definite possibility. How much of the data originally noted at the examinations has been omitted from the letters cannot be determined. The majority opinion, in finding such letters trustworthy, quite overlooked the fact that, while these particular letters may conceivably have been honestly written, once the general principle is established of allowing such letters in evidence without laying a proper foundation for them and without making available for cross-examination the doctors who wrote them or establishing their qualifications as experts, the door will be wide open to the use in personal injury trials by both parties of exaggerated or even fraudulent reports from unqualified doctors who need never fear exposure by cross-examination.

In order to clarify and further explain the scope of the ruling in the *Hoffman* case and to prevent further misunderstanding and conflict in the lower courts as to the doctrine there promulgated, this Court should now review the question anew. Since most railroads today treat their injured employees wholly or partially, and often the employees are referred to outside doctors, and since the question of

the status of reports or letters written by such doctors to the railroads is bound to arise frequently at trials of suits brought by employees to recover damages for the injuries, it is especially important for this Court to take the present opportunity to settle the matter definitely before further confusion arises.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Of Counsel.

APPENDIX.

Statutes Involved.

Section 1 of the Federal Employers' Liability Act of 1908, as amended (Act of April 22, 1908, c. 149, § 1, 35 Stat. 65, 45 U. S. C. § 51) reads as follows:

> "Every common carrier by railroad while engaged in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The Federal Business Records Act (28 U. S. C. § 1732) reads as follows:

> "In any court of the United States and in any court established by Act of Congress, any writing

or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business', as used in this section, includes business, profession, occupation, and calling of every kind."

Section 374-a of the New York Civil Practice Act reads as follows:

"Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its

weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind."

Rule 43 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. § 723 (c), reads as follows:

"All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

OCT 3
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No. 297.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

—against—

GEORGE P. KORTE,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT, GEORGE P. KORTE, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. .

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

—against—

GEORGE P. KORTE,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT, GEORGE P. KORTE, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Court Below.

There was no opinion in the trial court, the District Court of the United States for the Eastern District of New York. The opinions of the Court of Appeals for the Second Circuit, not yet reported officially, decided July 24th, 1951, are set out in the Record at pages 285-297.

II.

Summary Statement of the Argument.

1. The decision of the court below was in accord with the many decisions of this Court determining what constitutes sufficient evidence to prove negligence in actions brought under the Federal Employers' Liability Act, and in no wise does the decision rest on speculation.

2. The decision of the Court of Appeals for the Second Circuit in the present case is not in conflict with the decision of the Court of Appeals for the Third Circuit in *Masterson* v. *Pennsylvania R. Co.*

3. There is no conflict, actual or "probable" between the decision in the instant case of the Court of Appeals for the Second Circuit, and the decision of this Court in *Palmer* v. *Hoffman,* nor with the decisions of other Courts of Appeals relying on *Palmer* v. *Hoffman.*

4. Conclusion.

III.

Argument.

Respondent contends that the writ should be denied for the following reasons:

1. The decision of the court below was in accord with the many decisions of this Court determining what

constitutes sufficient evidence to prove negligence in actions brought under the Federal Employers' Liability Act, and in no wise does the decision rest on speculation.

A.

As a preliminary, it should be pointed out that "nothing is involved in this case except the drawing of allowable inferences from a necessarily unique set of circumstances". Review is granted by this Court "only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough." *Wilkerson* v. *McCarthy*, 336 U. S. 53, 66-67 (1949).

> "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. * * * A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court. If it only succeeds in demonstrating that the decision below may be erroneous, it has not fulfilled its purpose."
>
> Vinson, *C. J.*, address to the American Bar Association, reported in 69 Supreme Court Reporter, pages VI-VII (1949).

An important consideration in granting certiorari in this type of case is whether the jury function in passing on disputed questions of fact and in drawing inferences from proof and facts, has been respected,

or will be restored, if this Court intervenes. *Wilkerson* v. *McCarthy, supra,* 336 U. S. 53, 71, citing, *Jones* v. *East Tennessee V. & G. R. Co.,* 128 U. S. 443, 445 (1888); *Washington and G. R. Co.* v. *McDade,* 135 U. S. 554, 572 (1890); *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350, 353-354 (1943). See, *Moore* v. *Chesapeake & O. R. Co.,* 340 U. S. 573, 574 (1951).

It is submitted that certiorari should be denied in the instant case because:

1. The importance of the question as to the sufficiency of the evidence involves no more than its particular facts.

2. There is no showing that it is vital that the question involved be decided finally by the Supreme Court.

3. The historic function of the jury would be denied rather than respected or restored, if certiorari were granted.

B.

Petitioner misinterprets the decisions of this Court dealing with the question of sufficiency of evidence.

This Court long ago unanimously held that in Federal Employers' Liability Act cases, unless error was palpable, decisions of courts below should not be disturbed where the question presented was whether there were matters for the consideration of the jury.

> "The case, then, is one in which there is no question as to the interpretation of any provision

of the Federal Act or as to the definition of legal principle in its application, but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a question of this sort unless error is palpable. The present case is not of this exceptional character, and we confine ourselves to an announcement of our conclusion."

Great Northern Ry. Co. v. *Knapp,* 240 U. S. 464, 466 (1916).

See also, *Seaboard Airline Ry.* v. *Padgett,* 236 U. S. 668 (1915); *Southern Railway Co.* v. *Puckett,* 244 U. S. 571 (1917); *Parmerlee* v. *Chicago, Milwaukee & St. Paul Railway Co.,* 246 U. S. 658 (1918); *Chicago, Milwaukee & St. Paul Railway Co.* v. *O'Connor,* 248 U. S. 536 (1918); *Going* v. *Norfolk & Western Railway Co.,* 248 U. S. 538 (1918).

Following the 1939 amendments to the Act (53 Stat. 1404; 45 U. S. C., § 54 [1939]), striking out the harsh doctrine of assumption of risk, and otherwise clarifying the rights of the employee, this Court emphasized the announced Congressional intent that these cases be left to a jury.

"It appears to be the clear Congressional intent that, to the maximum extent proper, questions in actions arising under the Act, should be left to the jury."

Tiller v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, n. 68 (1943).

> "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."
>
> *Bailey* v. *Central Vt. R. Co., supra,* 319 U. S. 350, 354 (1943).

In recent years this Court has made it clear, beyond any question of doubt, that factual considerations are peculiarly for the jury.

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. * * * Courts are not free to re-weigh the evidence and set aside the verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."
>
> *Tennant* v. *Peoria & P. U. Ry. Co.,* 321 U. S. 29, 35 (1944).

> "Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Lavendar* v. *Kurn, supra* (327 U. S. 645), p. 652. And where as here, the case turns on controverted facts and the cred-

ibility of witnesses, the case is peculiarly one for the jury." (Parenthical matter supplied.)

Ellis v. *Union Pacific Railroad Co.*, 329 U. S. 649, 653 (1947).

This Court has steadfastly followed such reasoning in Federal Act cases dealing with personal injury:

Blair v. *B. & O. R. Co.*, 323 U. S. 600 (1945);
Cogswell v. *Chicago & E. I. R. Co.*, 328 U. S. 820 (1946);
Pauly v. *McCarthy*, 330 U. S. 802 (1947);
Myers v. *Reading Co.*, 331 U. S. 477 (1947);
Lillie v. *Thompson*, 332 U. S. 459 (1947);
Eubanks v. *Thompson*, 334 U. S. 854 (1948);
Penn v. *Chicago & N. W. R. Co.*, 335 U. S. 849 (1948);
Wilkerson v. *McCarthy*, 336 U. S. 53 (1949);

and it has held likewise in death actions:

Keeton v. *Thompson*, 326 U. S. 689 (1945);
Jesionowsi v. *Boston & Maine R. Co.*, 329 U. S. 452 (1947);
Anderson v. *Atchison, T. & S. F. R. Co.*, 333 U. S. 821 (1948);
Coray v. *Southern Pacific Co.*, 335 U. S. 520 (1949).

In the present case, the facts involved are simple:

"Plaintiff was injured on December 20, 1946, when he wrenched his back trying to open one of the familiar flat steel trap doors or 'traps' which cover the steps on railroad passenger cars and which, when opened, make it possible for passengers to ascend or descend the steps to the

vestibule of the car. He was on train No. 369, going from New Haven to Grand Central Station, New York, and was injured when he tried to open the trap, so that passengers could get off at the 125th Street station in New York" (R. 286).

The evidence indicated that the respondent stepped on the "dog" that releases the trap, but that the trap rather than opening from three to sixteen inches as is normal (R. 191), remained stuck (R. 19, 61, 72, 73, 260). Petitioner's own witnesses testified: that the practice required that the traps be inspected at least twice daily (R. 193-194); that such traps stuck and were out of order (R. 233-234); and that in fact trap doors sometimes stuck so tight that the cars had to be shopped in order that hammers be used to "bang" such doors open (R. 196).

Petitioner offered no direct evidence to contradict respondent's statement of the happening of the accident. Not one witness was produced who actually inspected the cars before or after the accident nor who testified from personal knowledge that the trap doors were in fact in good working condition—this in spite of the fact that respondent personally filed a regular accident report form as required by I. C. C. regulations (R. 69-70) which afforded the opportunity to (actually, required) petitioner to inspect the cars involved, and in spite of the fact that petitioner's witness testified that inspectors in Connecticut and in New York, in the terminals and in the yards, inspected these cars at least twice daily (R. 193-194).

Petitioner makes much of the fact that the release

mechanism or "dog" worked (brief, pp. 4-5). Respondent at all times agreed that it did (R. 19, 60-61).

Clearly involved was a question for the jury whether petitioner was negligent in failing to inspect (or in failing to inspect properly) (R. 287-288), and in having a trap door that was rusty (R. 19, 42, 63, 64); that lacked oil (R. 13, 63, 88-89); and that stuck so tight as to cause the respondent's injuries (Exhibit A, R. 70, 260; 18-19, 42, 74).

And as to petitioner's contention that the accident was not reasonably foreseeable (brief, p. 11), the court below said:

> "It is certainly foreseeable that a man may injure his back or a muscle trying to raise a trap door which, by Mr. Hogan's (petitioner's witness) testimony, weighs '80 pounds without fixtures; with fixtures it runs about 95'. Moreover, Mr. Hogan testified that he had trouble with the trap doors on the New Haven's cars, and in the past had 'shopped' cars to have defective traps repaired. The testimony was thus adequate to support forseeable ability" (R. 288). (Parenthetical matter supplied.)

Petitioner's brief (p. 12) relies on three decisions of this Court to support its assertion that the respondent failed to prove negligence:

New York Central R. Co. v. *Ambrose,* 280 U. S. 486 (1930);
Pennsylvania R. Co. v. *Chamberlain,* 288 U. S. 333 (1933);
Moore v. *Chesapeake & O. R. Co.,* 340 U. S. 573 (1951).

The *Ambrose* case probably does not represent existing law. See *Wilkerson* v. *McCarthy, supra,* 336 U. S. 53, 69 (1949). And there is serious doubt whether the decision in *Pennsylvania R. Co.* v. *Chamberlain* represents the present state of the law, in view of later decisions of this Court. See *Baltimore & O. R. Co.* v. *Poston,* 177 F. (2) 53, 55 (Cir. Ct., D. C., 1949).

But be that as it may, all three cases relied on by petitioner deal with death actions where plaintiff's cases failed for want of direct proof. The instant case is completely different in that there was direct positive evidence of petitioner's negligence offered on behalf of respondent and, ironically enough, a complete lack of such testimony relating to negligence, on behalf of petitioner.

2. The decision of the Court of Appeals for the Second Circuit in the present case is not in conflict with the decision of the Court of Appeals for the Third Circuit in *Masterson* v. *Pennsylvania R. Co.*

A.

Masterson v. *Pennsylvania R. Co.,* 182 F. (2) 793, relied on by petitioner (brief, p. 12) is very much unlike the instant case in several very important factual respects.

In the instant case the record discloses that the entire treatment of respondent's injury was by railroad doctors and at the direction of petitioner's hospital (R. 21-40), with the exception of one unimportant visit by respondent's family doctor when no railroad doctor was available (R. 38).

Dr. Jenkins of the railroad hospital saw respondent

the day following the accident and from then continuously for two and a half or three months (R. 22). Respondent was getting worse, so Dr. Jenkins, after having respondent X-rayed, directed him to Dr. O'Connor, an orthopedic specialist (R. 23). The latter, after examination, directed respondent to go to Dr. Brody, a neuro-surgeon (R. 24). Respondent never knew either doctor before, and went solely at the direction of Dr. Jenkins (R. 26). After examinations by both men, they sent respondent to the New Haven Hospital (not the railroad hospital) where the internes, house doctor, and Drs. Brody and O'Connor examined respondent day and night for three days (R. 24). Dr. Brody did not want to operate unless absolutely necessary, and finally decided against the operation (R. 24) in favor of his previously recommended conservative course (R. 33). Dr. Brody then instructed respondent how to restore the circulation to his legs (R. 39); and Dr. Jenkins requested that respondent's wife report to the railroad hospital for instructions as to how to give treatments at home to Korte, and these treatments were continued down to the date of trial (R. 37).

The diagnoses of Doctors O'Connor and Brody were the working diagnoses of doctors treating respondent, and preparing on the basis of these very reports, to perform a serious operation on his spine.

In the *Masterson* case, the statements in question related to examinations made solely for the purpose of reporting to the railroad's chief medical examiner, in connection with a disputed claim, and not as here, in conjunction with treatments and operation.

> "Actually these letters appear to have been written not as normal or routine records of medi-

cal observation or treatment, but rather as aids in resolving a controversy about legal responsibility. 'Their primary utility is in litigating, not in railroading' or in healing. To admit them would be to bring 'the business of preparing cases for trial' within the purview of the Federal Business Records Act." (Quoting from *Hoffman* v. *Palmer,* 318 U. S. 109, 114 [1943].)

Masterson v. *Pennsylvania R. Co., supra,* 182 F. (2) 793, 797.

In the instant case, the diagnoses of the doctors were made as a basis for treatment; long before any litigation or claim was contemplated or commenced; and not for the purpose of testifying in a possible lawsuit.

B.

The completely different factual situation in the two cases gives rise to an important difference in legal principles applicable to the two cases.

In the instant case it was clear from the outset that the trial judge appreciated that the diagnoses in question were admissions by the petitioner (R. 25-26).

When petitioner objected that the doctors were not railroad doctors, the trial court sustained such objection to the introduction of the diagnoses until proof was forthcoming as to the relationship of the doctors to petitioner (R. 25-26).

Even after such testimony was forthcoming (R. 26), the trial court offered to postpone the trial, to

allow petitioner to either take the depositions of the doctors or to compel their attendance in court by subpoena, thereby offering petitioner the opportunity to rebut the agency relationship (R. 31). Petitioner refused both offers (R. 31).

Finally, the trial court carefully excluded all "hearsay" in the form of case history, and instructed the jury in conformance thereto (R. 29).

The Court of Appeals clearly appreciated the evidentiary application of the rules relating to admissions. Its opinion relies chiefly on *Pekelis* v. *Transcontinental & Western Air,* 187 F. (2) 122 (2d Cir., 1951) (R. 292-293). That case involved the question of the admissibility in evidence of certain reports of the defendant carrier. The Court of Appeals for the Second Circuit found that they were properly admissible as admissions in that they were (a) reports inconsistent with the position taken by the defendant at the trial, and (b) binding on the defendant.

In arriving at its conclusion in the *Pekelis* case, the court quoted from the opinion of Wyzanski, *J.,* in *United States* v. *United Shoe Machinery Corp.,* 89 F. Supp. 349, 352 (D. C., Mass., 1950):

> "Even if the principal does not expressly vouch for the agent's statement, if he acts or conducts his business in such a way as to show by implication that he adopted the statement, then such parts of the statement as he acted upon are 'his'. And to that extent the statement is receivable against the principal as an adoptive admission. Morgan, The Law of Evidence, 1941-1945, 59

> Harv. L. Rev. 481, 559 before note 322; Morgan, Admissions, 12 Wash. L. Rev. 181, 186."

The court below apparently felt that in the instant case the treatment by the doctors and their decision to operate, both based on the diagnoses in question, constituted adoptive admissions; and that "the *Pekelis* case is clear authority for the admission of business entries from these doctors when offered by the plaintiff and not by the entrants or the company for whom they were—temporarily—acting" (R. 293). This Court denied certiorari in the *Pekelis* case, *supra,* 341 U. S. 951 (1951).

In the *Masterson* case, the court expressly found (182 F. (2) 793, 797) no basis for an admission:

> "Much less was it an admission of the truth of the statements contained in the letters. For there was no evidence that these physicians were employees or agents of the railroad whose statements would be binding upon it."

C.

There is an important difference in state law between the decision of the court in the *Masterson* case, *supra,* and the decision of the court below in the instant case, with respect to admissibility of business records.

To hold the documents inadmissible in each case, the respective court would have had to find that the evidence was inadmissible under *both* Federal and applicable state law. Federal (Petitioner's Brief, p. 21) Rules of Civil Procedure, Rule 43(a), 28 U. S. C., § 723(c).

The applicable Pennsylvania statute, the Uniform Business Records as Evidence Act, 28 P. S., § 91b, specifically provides:

> "A record of an act, condition or event shall, in so far as relevant, be competent evidence *if the custodian or other qualified witness testifies to its identity and the mode of its preparation,* and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." (Italics supplied.)

In the *Masterson* case, no custodian or other qualified witness, testified as required by the state law. 182 F. (2) 793, 797.

In the instant case, far from finding that the applicable state law rendered the evidence inadmissible, the court below would have found that the relevant state statute (Petitioner's Brief, p. 20, Section 374-a of the New York Civil Practice Act) and the decisions based on it, compel a finding that the diagnoses are admissible.

> "The diagnoses were 'records of an act, transaction, occurrence, or event made in the course of the doctor's profession', or the scientific deductions therefrom."
>
> *People* v. *Kohlmeyer,* 284 N. Y. 366, 369 (1940).

Even though the medical witness is in court and available to testify, but does not testify, his report alone is admissible under Section 374-a. *Meiselman* v. *Crown Heights Hospital,* 285 N. Y. 389 (1941).

The lower courts in New York have consistently followed the views set forth above. See *Duffy* v. *42nd St. M. & St. N. A. R. Co.,* 266 App. Div. 865 (2nd Dept., 1943), where a judgment of the trial court in favor of plaintiff was reversed for error in excluding a portion of a certificate showing cause of death; *Mayole* v. *B. Crystal & Son, Inc.,* 266 App. Div. 1008 (2nd Dept., 1943), where a judgment in favor of defendant was reversed for error in excluding portions of medical records; see also, *People* v. *Nisonoff,* 267 App. Div. 356 (1st Dept., 1944), aff'd 293 N. Y. 597, cert. den. 326 U. S. 745 (1945); *Cerniglia* v. *City of New York,* 182 Misc. 441 (Sup. Ct., Kings County, 1944); *In re Monroe's Will,* 270 App. Div. 1039 (2nd Dept., 1946).

That there is no practical distinction between records of physicians and hospital records insofar as admissibility is concerned, see Hayt & Hayt, Law of Hospital, Physicians and Patient (1947), p. 605; Brahan, *J.,* Case Records of Hospitals and Doctors as Evidence under the Business Records Act, 21 Temple L. Q. 113 (1947); 135 ALR 1258; *Freedman* v. *Mutual Life Ins. Co.,* 342 Pa. 404, 21 A. (2) 81 (1941).

Even where admission of a whole record or report was found to be erroneous, it was held proper to receive that portion of the record consisting of diagnoses of doctors. *Bothner* v. *Keegan,* 275 App. Div. 470 (1st Dept., 1949); *Constantinides* v. *Manhattan Transit Co.,* 264 App. Div. 147 (1st Dept., 1942); *Del Re* v. *City of New York,* 180 Misc. 525 (App. Term, 2nd Dept., 1943).

In the *Masterson* case, the documents were excluded by the terms of the Pennsylvania statute; no recourse to state decisions was necessary. In the instant case, the older New York statute, broader in its terms and the subject of much interpretation by the state courts, provides ample basis for admitting the diagnoses in question.

D.

Lastly, there is a basic difference in the circumstances involved in the use of the challenged documents, as between the instant case and the *Masterson* case, *supra*.

In the *Masterson* case, the letters in question were offered in evidence by the plaintiff. There is nothing whatever in the report of the case to indicate that the medical witnesses of either side used the letters involved as bases for their testimony. In fact, the contrary seems to be clearly implied.

In the instant case petitioner used but one medical witness, Dr. Kennedy, who saw respondent but once and that single time for the purpose of qualifying to testify at the trial (R. 148). Petitioner had forwarded to him copies of reports of its doctors including the diagnoses here in question, those of Drs. O'Connor and Brody (R. 165). Dr. Kennedy testified that those reports were read by him preparatory to his examination of respondent (R. 165, 172).

The law is well established that under such circumstances the testimony of the medical witness is inadmissible unless the aids used by him in arriving at his opinions are in evidence. 3 Wigmore, Evidence

(3rd Ed., 1940), § 795; *Nazzaro* v. *Angellini,* 217 App. Div. 415 (3rd Dept., 1926); *Gastiger* v. *Horowitz,* 220 App. Div. 284 (2nd Dept., 1927); *Cellamare* v. *Third Ave. Transit Corporation,* 273 App. Div. 260 (1st Dept., 1948); *Harden* v. *Fahrenkopf & Reufle,* 229 App. Div. 1 (3rd Dept., 1930); Rogers, The Law of Expert Testimony (3rd Ed., 1941), p. 83.

This rule has particular applicability where the medical witness is one whose examinations were solely for the purpose of testifying. *Nashville, C. & St. L. Ry. Co.* v. *York,* 127 F. (2) 606 (6th Cir., 1942); see also, 175 ALR 274.

Petitioner's only medical witness would have been unable to testify unless the documents in question had been in evidence. Even had respondent not offered the diagnoses, petitioner was under a compulsion to do so at the peril of having its medical testimony stricken from the record.

Following this analysis it is apparent that the decision of the Court of Appeals for the Second Circuit in the present case in no wise conflicts with the decision of the Court of Appeals for the Third Circuit in *Masterson* v. *Pennsylvania R. Co.*

3. There is no conflict, actual or "probable" between the decision in the instant case of the Court of Appeals for the Second Circuit, and the decision of this Court in *Palmer* v. *Hoffman,* nor with decisions of other Courts of Appeal relying on *Palmer* v. *Hoffman.*

In *Palmer* v. *Hoffman,* 318 U. S. 109 (1943), this Court held that a statement of the railroad engineer

involved in a fatal collision with an automobile in a grade crossing accident was inadmissible under the Federal Business Records Act, now 28 U. S. C., § 1732.

This Court, in arriving at its decision, stated at page 113:

> "It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made 'in the regular course' of the business within the meaning of the Act."

As stated by the court below, this limitation is aimed at a litigant introducing evidence "built up to promote the self interest of the entrant" or "contrived by the entrant for litigation" (R. 292).

Quite apart from any other considerations, the facts in the instant case are materially different from those in *Palmer* v. *Hoffman*. The diagnoses of the doctors, as has been pointed out were those of doctors whose sole concern was the treatment, and possible operation, upon their patient. The diagnoses were made within days of the happening of the acci-

dent and years before litigation was instituted. Certainly it cannot be said that the making of a diagnosis under these circumstances is not the "business" of a doctor.

Moreover, these diagnoses were not offered by the party at whose behest they were prepared. There is not present the promotion of "self interest of the entrant".

Completely dissimilar also is the fact that in the present case the basis for admission of the documents is found at least partly in the evidentiary rule pertaining to admissions. No possibility of an admission was presented in *Palmer* v. *Hoffman.*

Absent also in the latter case is the important feature that the diagnoses were used by a medical witness as an aid to prepare him to testify in the trial court.

Certainly, if there is no conflict between the decision of this Court in *Palmer* v. *Hoffman* and the decision of the court below in the instant case, there can be no conflict between the cases cited by petitioner (brief, pp. 14-15) as relying on *Palmer* v. *Hoffman,* and the decision below.

4. Conclusion.

Petitioner in the instant case has in no wise met the requirement of this Court, as stated by Chief Justice Taft speaking for a unanimous court in *Layne & Bowler Corp.* v. *Western Well Works,* 261

U. S. 387, 393 (1923), that the writ of certiorari be not granted

> "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal".

Wherefore, it is respectfully submitted that the petition for a writ of certiorari be denied.

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